

## Update: Sexual Assault Benchbook

### CHAPTER 3

#### Other Related Offenses

#### 3.18 Internet and Computer Solicitation

##### F. Pertinent Case Law

At the top of page 168, insert the following before the existing text in this subsection:

A defendant who uses a computer or the Internet to communicate with an individual the defendant believes to be a minor\* in an effort to arrange a meeting at which the defendant expects the “minor” to fellate him may be bound over for trial for allegedly violating MCL 750.145d(1)(a) by attempting to engage in conduct prohibited by MCL 750.520d(1)(a)—third-degree criminal sexual conduct. *People v Cervi*, \_\_\_ Mich App \_\_\_, \_\_\_ (2006). Similarly, a defendant who uses a computer or the Internet to communicate with an individual the defendant believes to be a minor in an effort to arrange a meeting at which the defendant is to videotape the sexual activity that occurs between him and the “minor” may be bound over for trial for allegedly violating MCL 750.145d(1)(a) by attempting to engage in conduct prohibited by MCL 750.145c(2). *Cervi*, *supra* at \_\_\_.

In *Cervi*, the defendant met the “minor” through an instant-messaging service on the Internet. After the first contact, the defendant repeatedly contacted the “minor” and discussed meeting each other and the sexual conduct that would occur when they met. The defendant’s communication with the “minor” constituted an attempt to commit third-degree criminal sexual conduct, an offense that triggers application of MCL 750.145d(1)(a) when the intended victim is a minor or the defendant believes the intended victim is a minor. *Cervi*, *supra* at \_\_\_. The Court further concluded that the defendant was properly charged with separate counts of violating MCL 750.145d(1)(a) for each time the defendant communicated on the Internet with the “minor” for the purpose of arranging a meeting to engage the “minor” in conduct prohibited by MCL 750.520d(1)(a). *Cervi*, *supra* at \_\_\_. Specifically, the Court stated:

\*In this case, the minor was an undercover deputy sheriff posing as a minor.

“[T]he prosecution properly can charge defendant under subsection 145d(1)(a) for each instance in which defendant used a computer to communicate with a perceived minor with the specific intent to engage in sexual penetration with someone he believed was between 13 and 16 years of age.” *Cervi, supra* at \_\_\_\_.

In response to the defendant’s request, the “minor” agreed to let the defendant videotape the sexual contact that was to take place when they met. According to the *Cervi* Court, these circumstances “support[] a reasonable inference that defendant communicated with [the “minor”] for the purpose of attempting, or with the specific intent to attempt, to arrange for, produce, or make ‘child sexually abusive material.’” *Cervi, supra* at \_\_\_\_.

The defendant also contended that MCL 750.145d violated his right to free speech because it criminalized words alone. The *Cervi* Court disagreed and explained that MCL 750.145d “criminalizes communication with a minor or perceived minor with the specific intent to make that person the victim of one of the enumerated crimes.” *Cervi, supra* at \_\_\_\_.

The Court elaborated:

“[T]he content of defendant’s speech is more than mere words, because the content of the message combined with the sender’s intent together comprise an invitation, and it is the act of issuing that invitation to a person the issuer believes is a child that is proscribed by law. However repugnant his words might be, the operative issue is not what defendant said, it is his act of saying them to a person he believed was a 14-year-old girl with the intent that she would accept his invitation to engage in a sexual encounter.” *Cervi, supra* at \_\_\_\_.

## CHAPTER 7

### General Evidence

#### 7.3 Evidence of Other Crimes, Wrongs, or Acts

##### E. Admissibility of Evidence That Defendant Committed Other Acts of Domestic Violence

Effective March 24, 2006, 2006 PA 78 enacted a statute authorizing the admission of evidence regarding a defendant's other acts of domestic violence. Immediately after the January 2006 update to page 342, add a new subsection (E) as indicated above and insert the following text:

Evidence that a defendant committed other acts of domestic violence is admissible in a criminal action against a defendant accused of committing an offense involving domestic violence. MCL 768.27b.\* If admissible, such evidence may be introduced “for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.” MCL 768.27b(1). The statutory provisions of MCL 768.27b “do[] not limit or preclude the admission or consideration of evidence under any other statute, rule of evidence, or case law.” MCL 768.27b(3).

Notice requirements apply to evidence sought to be admitted under MCL 768.27b. A prosecutor intending to introduce evidence admissible under this statute “shall disclose the evidence, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown.” MCL 768.27b(2).

In addition to the notice requirement, there is a temporal requirement in MCL 768.27b. “Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that admitting this evidence is in the interest of justice.” MCL 768.27b(4).

For purposes of MCL 768.27b, the definition of “domestic violence” is substantially similar to the definition in MCL 400.1501(d), and by reference, to the definition in MCL 600.2157a(1)(b).\* MCL 768.27b(5).

\*Applicable to trials and evidentiary hearings started or in progress on or after May 1, 2006.

\*See Section 7.15(A) for a detailed discussion.

## CHAPTER 7

### General Evidence

#### 7.5 Testimonial Evidence of Threats Against a Crime Victim or a Witness to a Crime

##### D. Statutory Authority for the Admission of Threat Evidence in Cases Involving Domestic Violence

Effective March 24, 2006, and applicable to trials and evidentiary hearings started or in progress on or after May 1, 2006, a declarant's statements are admissible under specific circumstances in criminal cases involving domestic violence. 2006 PA 79. On page 363, immediately before Section 7.6, add a new subsection as indicated above and insert the following text:

MCL 768.27c provides statutory authority for the admission under certain circumstances of a declarant's statement pertaining to injuries sustained by, or threats of injury to, the declarant. A declarant's statement may be admitted under MCL 768.27c if all of the following circumstances exist:

“(a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

“(b) The action in which the evidence is offered under this section is an offense involving domestic violence.

**Note:** The definition of “domestic violence” in MCL 768.27c is substantially similar to the definition in MCL 400.1501(d), and by reference, to the definition in MCL 600.2157a(1)(b).<sup>\*</sup> MCL 768.27c(5)(b).

“(c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.

“(d) The statement was made under circumstances that would indicate the statement's trustworthiness.

“(e) The statement was made to a law enforcement officer.” MCL 768.27c(1).

The statute includes, but does not limit, factors for determining whether a declarant's statement is trustworthy for purposes of MCL 768.27c(1)(d). To determine whether a statement is trustworthy, a trial court should consider:

<sup>\*</sup>See Section 7.15(A) for a detailed discussion.

“(a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

“(b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

“(c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section.” MCL 768.27c(2).

Notice requirements apply if a prosecutor intends to introduce evidence of a declarant’s statement under MCL 768.27c:

“(3) If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown.”